NO. 92-1349

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

ERNEST D. SHARP,
Petitioner

versus

JOHNSON BROTHERS CORPORATION, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Does an order approving a settlement of a disputed claim under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901, preclude recovery under the Jones Act, 46 U.S.C. 688, when the order is entered by consent and without stipulation, adjudication, or determination of jurisdiction, status, or compensability under the LHWCA, and when the settlement specifically reserves the claimant's right to proceed under the Jones Act?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Ernest D. Sharp and the respondents Johnson Brothers Corporation, St. Paul Fire & Marine Insurance Company, and Centennial Insurance Company. Wausau Insurance Company appeared as an intervenor in the proceedings below but is not a party to these proceedings.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ERNEST D. SHARP,
Petitioner

versus

JOHNSON BROTHERS CORPORATION, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Ernest D. Sharp respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on November 10, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 973 F.2d 423 and is reprinted in the appendix hereto.

The oral reasons for judgment of the United States District Court for the Eastern District of Louisiana are unreported but have been transcribed and appear in the index hereto.

The settlement and order of the Administrative Law Judge, issued under 33 U.S.C. 908(i), in the Department of Labor proceedings, OWCP No. 7-102714, are reproduced in the appendix hereto.

JURISDICTION

The petitioner invoked the maritime jurisdiction of the federal courts pursuant to 28 U.S.C. 1333 and federal jurisdiction pursuant to 46 U.S.C. 688. On August 27, 1991, a final judgment was entered against the petitioner pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

The petitioner took an appeal from this judgment and on September 25, 1992, the United States Court of Appeals for the Fifth Circuit issued an opinion affirming the decision of the United States District Court for the Eastern District of Louisiana and entered judgment against the petitioner.

On October 9, 1992, the petitioner filed a Suggestion for Rehearing En Banc. The Fifth Circuit treats a suggestion for rehearing en banc as a petition for panel rehearing. ***Gonzales v. Southern Pacific Transportation Co.,*** **773 F.2d 637 (5th Cir. 1985).** On November 10, 1992, the Fifth Circuit entered judgment against the petitioner denying his petition for panel rehearing. ***Missouri v. Jenkins,*** **495 U.S. 45, 110 S.Ct. 1660, 109 L.Ed 2d 50 (1990).**

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

STATUTE INVOLVED

33 U.S.C. 908(i)(1): Whenever the parties to any claim for compensation under this Chapter, including survivors benefits, agree to a settlement, the deputy commissioner or administrative law judge shall approve the settlement within thirty days unless it is found to be inadequate or

procured by duress. Such settlement may include future medical benefits if the parties so agree. No liability of any employer, carrier, or both for medical, disability, or death benefits shall be discharged unless the application for settlement is approved by the deputy commissioner or administrative law judge. If the parties to the settlement are represented by counsel, then agreements shall be deemed approved unless specifically disapproved within thirty days after submission for approval.

STATEMENT OF THE CASE

Ernest Sharp was employed by Johnson Brothers and worked as a piledriver aboard a fleet of barges and a tugboat chartered by that company. In November of 1985, while Sharp was working aboard the tugboat, a barge crane dropped a load of angle iron on him, causing injuries to his back, knee and ankle.

There were in force and effect at the time four separate insurance policies procured by Johnson Brothers to cover its activities. St. Paul and Marine Insurance Company (St. Paul) provided protection and indemnity for the tug operations; Centennial Insurance Company (Centennial) provided primary protection and indemnity coverage for the barges; Wausau Insurance Company (Wausau) provided coverage for worker's compensation and general employer's liability.

Following the accident, Johnson Brothers and Wausau filed a notice of injury with the U.S. Department of labor (DOL) and voluntarily commenced benefits under the LHWCA. Sharp took no action regarding enforcement of his potential rights until November 1986 when, following knee and back surgery, he filed suit under the Jones Act, 46 U.S.C. 688, in the United States District Court for the Eastern District of Louisiana.

St. Paul answered and defended Johnson Brothers on the Jones Act claim, but with a reservation of rights. Centennial, brought in by third party demand, denied coverage from the outset. In the district court suit, Johnson Brothers, St. Paul, and Centennial urged that Sharp was not a seaman under the Jones Act.

In August of 1987, Wausau terminated payments under the LHWCA. Sharp, as a result of financial hardship arising from the termination of payments, for the first time filed a claim with the United States Department of Labor to preserve his rights in that forum. He likewise demanded payment of maintenance and cure from Johnson Brothers and St. Paul. From August of 1987 until October 1989, Sharp received neither longshoremen's compensation nor seaman's maintenance. At the Department of Labor, Johnson Brothers and Wausau urged that Sharp was a seaman and thus not eligible for compensation under the LHWCA.

Following the filing of his Jones Act suit in November of 1986, trial of Sharp's case was continued four times upon motion of the district court. In June of 1989, after three (3) days of trial on status only, the district court granted a directed verdict against Sharp on the grounds that the barges were not vessels and that he was not a seaman. Sharp appealed this decision to the United States Court of Appeals for the Fifth Circuit and on November 21, 1990, that Court reversed and remanded the case to the District Court, holding that Sharp had presented sufficient evidence for a finding of seaman status. ***Sharp v. Johnson Bros. Corp.*, 917 F.2d 885 (5th Cir. 1990).**

Following trial and while awaiting a final judgment which to appeal, Sharp entered negotiations with Johnson Brothers and Wausau for settlement of whatever claims he might have under the LHWCA. Sharp made it clear, as

evidenced by settlement letters in the record, that he intended to appeal the District Court's decision that he was not a seaman; but he could not continue to pursue his Jones Act remedies without sustenance for himself and his family.

On September 20, 1989, Sharp, Johnson Brothers and Wausau agreed upon a settlement . In exchange for a lump sum payment, Sharp agreed to release Wausau from all liability and to release Johnson Brothers from any liability that it may have under the LHWCA and from any uninsured tort liability. The settlement agreement, executed on October 5, 1989, specifically reserved Sharp's rights to pursue Johnson Brothers under under the Jones Act through execution of judgment, to the extent that Johnson Brothers was insured by St. Paul and/or Centennial. The settlement agreement further provided that Sharp would not receive a double recovery, since he would be required by the terms of the agreement to reimburse his employer and its compensation insurer in full all compensation received, should he eventually obtain a judgment and recovery under the Jones Act.

Since Johnson Brothers' liability under the LHWCA could be discharged only by processing the settlement through the Department of Labor, Wausau's attorneys drafted and submitted a 33 U.S.C. 908(i) settlement application. Just as in the receipt and release, the parties to the 8(i) application made it clear that the question of Sharp's status should be determined by a jury in district court. The Admisintrative Law Judge is directed by Section 908(i) to approve the formal settlement agreement unless it is found "inadequate or procured by duress." Approval by the Administrative Law Judge was not required by section 908(i)(1), which provides that when the parties are represented by counsel agreements shall be deemed approved unless specifically disapproved within thirty (30)

days after submission for approval, without further action by the Department of Labor or Administrative Law Judge.

Section 908(i) does not require that the Deputy Commissioner of the Department of Labor or the Administrative Law Judge make determinations of jurisdiction, status, or compensability. Accordingly, they were not asked to make nor did they make any such determinations in approving the settlement agreement. In reaching the determination that the settlement agreement was not "inadequate or procured by duress," the Administrative Law Judge did not hold a hearing, take testimony, or make findings regarding any fact, jurisdiction, status, or compensability under the LHWCA. The settlement agreement was approved and a pro forma order was issued by the Department of Labor that the agreement was not "inadequate or procured by duress." **33 U.S.C. 908(i).**

Upon remand of the Jones Act case to the United States District Court for the Eastern District of Louisiana and upon motion for summary judgment, the District Court held that Sharp's settlement of his claim under the LHWCA constituted an "election of remedies", which precluded recovery under the Jones Act. Sharp timely appealed this decision to the United States Court of Appeals for the Fifth Circuit. On September 25, 1992, the United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court, holding that a settlement agreement that is approved by an administrative law judge constitutes a formal award that bars relief under the Jones Act. ***Sharp v. Johnson Bros. Corp.*, 973 F.2d 423, (5th Cir. 1992).** Although the Court acknowledged that the question of LHWCA coverage was never litigated in an adversarial proceeding and that consent judgments do not give rise to collateral estoppel. ***Hughes v. Santa Fe Int'l, Corp.*, 847 F.2d 239 (5th Cir. 1988),** the Court reasoned that the Administrative Law Judge's approval of the settlement agree-

ment and his order to pay pursuant to the settlement constituted a "formal award". The Court held that receipt of benefits pursuant to a formal award under any circumstances bars recovery under the Jones Act.

REASONS FOR GRANTING THE WRIT

I.

The Fifth Circuit failed to follow and adhere to the reasoning and policy of this Court as stated in *Southwest Marine, Inc. v. Gizoni.*

In *Southwest Marine, Inc. v. Gizoni,* ____U.S.____, 112 S. Ct. 486, 116 L.Ed.2d 205 (1991), This Court held unanimously that:

> It is by now "universally accepted" that an employee who receives voluntary payments under the LHWCA without a formal award is not barred from subsequently seeking relief under the Jones Act.

112 S. Ct. 486, 493. The United States Court of Appeals for the Fifth Circuit distinguished the present case from *Gizoni* on the grounds that Sharp obtained a "formal award", albeit by consent and without an adjudication of his status. The United States Court of Appeals for the Fifth Circuit held that he was thereby precluded from pursuing his Jones Act remedies.

In failing to acknowledge the difference between a "formal award" and a Section 908(i)(1) settlement agreement, the United States Court of Appeals for the Fifth Circuit overlooked, or otherwise failed to account for, the legal basis for this Court's holding in *Gizoni*. There, this Court stated that acceptance of longshoremen benefits did not preclude a Jones Act recovery, "quite obviously, because the question of coverage has never actually been litigated."

112 S.Ct. 486, 494. Consequently, this basis for permitting the Jones Act claim to proceed would apply equally to the acceptance of benefits, to a settlement, or to a consent judgment - quite obviously, because in such cases, the question of coverage has "never actually been litigated". In Sharp's case before the Department of Labor, the question of status was, again, never stipulated, litigated, or adjudicated. The approval of the settlement agreement by the Administrative Law Judge, his so called "formal award" was nothing more than a consent judgment, without litigation of coverage.

According to principles long established by both this Court and by the federal courts, such judgments are not given preclusive effect, unless that is the intent of the parties. ***Kaspar Wire Works, Inc, v. Leco Engineering & Mach.,*** **575 F.2d 530 (5th Cir. 1978).** The Court's reasoning in ***Gizoni*** simply reflected these well established principles.

In ***Gizoni;*** this Court cited with approval ***Simms v. Valley Line Co.,*** **709 F.2d 409, 412, and nn. 3 and 5 (5th Cir. 1983)** and **G. Gilmore and C. Black, *The Law of Admiralty* 435 (2d ed. 1975).** The following passage is contained at the pages cited by this Court:

> Even the payment of benefits pursuant to a formal award in a contested proceeding is not necessarily fatal to the Jones Act action. The courts have shown themselves receptive to the argument that the award may have been made without a proper adjudication of the claimant's status as a harbor worker or seaman. **Gilmore & Black, supra, at 435; 709 F.2d 409, 412, n. 5.**

Relying upon the foregoing case law and learned treatises and the cited passage, this Court stated that the seaman's suit is not barred by anything less than the actual litigation and determination of the question of coverage. 112

S.Ct. at 494. Contrary to the holding of the United States Court of Appeals for the Fifth Circuit, it is not the receipt of benefits, nor an approved settlement, nor a pro forma award which bars suit; rather, it is a final judgment issued after actual litigation and determination of the claimant's status.

This Court in ***Gizoni,*** by its reference to the ***Simms*** case, to Gilmore & Black, and to Professor Larson's treatises on compensation, clearly drew a distinction between the various forms that a formal award can take. For a formal award to have preclusive effect, the issues of jurisdiction, coverage, and compensability must have been actually litigated and determined. A formal approval of a settlement agreement, although enforceable, is still just a settlement; it is not a formal award based on an adjudication of coverage. It can not be identical in effect to the conclusion reached by a judge after a trial; it does not reflect the considered judgment of a judicial officer. A formally approved settlement is forged by the parties alone as an adjustment of conflicting claims and is not a tempered determination of fact and law after the annealment of an adversary trial. ***Kaspar Wire Works, Inc, v. Leco Engineering & Mach.,*** 575 F.2d 530 (5th Cir. 1978).

This Court recognized this distinction; the United States Court of Appeals for the Fifth Circuit did not. The holding and precedential effect of the Fifth Circuit's decision is that all formal awards and/or judgments are created equal; and that all such awards are to be given preclusive effect, regardless of the circumstances - even when there has been no actual litigation and judicial determination of the issues. This holding directly conflicts with the reasoning of this Court's decision in ***Gizoni.***

The Fifth Circuit stated that to allow a claimant to accept a settlement from a compensation insurer would

be unfair to the tort insurer and would discourage settlements. However, in the case before the Court, any inequity benefited the tort insurers to the detriment of the employer and its compensation insurer. By denying insurance coverage, by refusing to pay maintenance and cure, by delaying the litigation, and by refusing to settle, the tort insurers forced the employer, its compensation insurer, and the claimant into a settlement of the LHWCA claims. By giving this settlement a preclusive effect, where none was intended by the parties, the Fifth Circuit allowed the tort insurers to escape certain Jones Act liability. ***Sharp v. Johnson Brothers Corp.,*** **917 F.2d 885 (5th Cir. 1990).**

In the maritime and offshore industries, there are numerous cases where the claimant falls within the zone of uncertainty between the Jones Act and the LHWCA. In many such cases, both the employer and the injured worker may determine that it is in their respective best interests to settle the LHWCA claims and litigate the Jones Act claims. All LHWCA settlements must go through the 908(i) process and are followed by a pro forma award. If such settlements and awards are given preclusive effect, thereby releasing the employer's tort insurers, the ability of the employer, the compensation insurer, and the claimant to forge such agreements will be forever chilled, moreover, prohibited. See ***Zenith Radio Corp. v. Hazeltime Research, Inc.,*** **401 U.S. 321, 91 S.Ct. 795, 28 L.Ed. 2d 77 (1971).**

The decision of the United States Court of Appeals for the Fifth Circuit suggests that, although a claimant may pursue two remedies, he may receive only one award; and suggests further that there may be the threat of double recovery. The United States Court of Appeals for the Fifth Circuit ignored the terms of the settlement between Sharp and Wausau. By the terms of the settlement agreement, Sharp must pay Johnson Brothers and Wausau in full for

all compensation previously received, if and when he recovers from the tort insurers in the Jones Act case. Sharp and Wausau by contract did what the compensation act anticipates by law. As long as the threat of double recovery is removed, receipt of benefits, whether by voluntary payment, settlement, or award does not preclude subsequent recovery under the Jones Act. This proposition is stated clearly and unambiguously by this Court in ***Gizoni:***

> Moreover, the LHWCA clearly does not comprehend such a preclusive effect, as it specifically provides that any amounts paid to an employee for the same injury, disability or death pursuant to the Jones Act shall be credited against ***any liability imposed by the LHWCA.*** (Emphasis added) 112 S.Ct. 486, 494.

112 S.Ct. at 494.

The use of the phrase "any liability imposed by the LHWCA" is significant. Liability cannot be *imposed* other than by an order, award, or judgment. The holding of the United States Court of Appeals for the Fifth Circuit would not only preclude the claimant from recovering from the tort insurers; it would also preclude the compensation insurer from receiving the credit due. Congress and this Court did not intend such a preclusive effect.

The question, properly addressed and answered by this Court in ***Gizoni,*** but completely overlooked by the United States Court of Appeals for the Fifth Circuit, is whether there are circumstances under which a formal award will not preclude a Jones Act recovery. By this Court's plain language, relief under the Jones Act is not barred if "the question of coverage has never actually been litigated." In the case before the Court, the issues of jurisdiction, coverage, or compensability under the LHWCA were never litigated or determined.

II.

Giving a consent judgment a preclusive effect not intended by the parties conflicts with this Court's law of judgments.

The holding of the Court below carries with it implications which extend far beyond the field of maritime law and which may effect all cases of any nature in which parties to a suit attempt to forge a settlement. The Fifth Circuit essentially gave a settlement and consent judgment a preclusive effect not intended by the parties.

In so doing, the decision of the United States CCourt of Appeals for the Fifth Circuit is in direct conflict with the law of consent judgments as previously applied by this Court. ***Lawlor v. National Screen Service Corp.,*** **349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955);** ***United States v. ITT Continental Baking Co.,*** **420 U.S. 223, 95 S.Ct. 926, 43 L.ed.2d 148 (1975);** ***United States v. International Bldg. Co.,*** **345 U.S. 502, 73 S.Ct. 807, 97 L.Ed. 1182 (1952), rehearing denied, 345 U.S. 978, 73 S.Ct. 1120, 97 L.Ed. 1392 (1953).**

In ***United States v. International Bldg. Co.,*** **supra;** the Court stated:

> A judgment entered with the consent of the parties may involve a determination of questions of fact and law by the court. But unless a showing is made that that was the case, the judgment has no greater dignity, so far as collateral estoppel is concerned, than any judgment entered only as a compromise of the parties.

345 U.S. 502, 506.

That case, like Sharp's, involved a pro forma judgment approving a settlement between the parties. The reason for this rule, simply stated, is justice:

> But unless we can say that they were an adjudication on the merits, the doctrine of estoppel by judgment would serve an unjust cause: it would become a device by which a decision not shown to be on the merits would forever foreclose inquiry into the merits.

345 U.S. 502, 506.

The "formal award" given preclusive effect by the United States Court of Appeals for the Fifth Circuit was merely a consent judgment which ratified an agreement between the parties. The agreement reserved to Sharp the right to pursue his Jones Act remedies. The consent award was not an adjudication on the merits and should not therefore "forever foreclose inquiry into the merits." 345 U.S. 502, 506.

CONCLUSION

The Fifth Circuit's preclusion of the petitioner's Jones Act remedies by extension of the effect of a consent judgment, where no such preclusive effect was intended and where the precluded issues were never actually litigated or determined, conflicts with this Court's opinion in *Gizoni* and with the accepted law of judgments. The peti-

tioner respectfully requests issuance of a writ of certiorari for review.

Respectfully submitted:

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APPENDIX A

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ERNEST D.SHARP,
Plaintiff-Appellant,

WAUSAU INSURANCE COMPANY,
Intervenor-Appellant,

versus

JOHNSON BROTHERS CORPORATION,
ST. PAUL FIRE & MARINE INSURANCE COMPANY,
and CENTENNIAL INSURANCE COMPANY,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC

(Opinion September 25, 5 Cir., 1992, ____F.2d____)

(November 10, 1992)

Before POLITZ, Chief Judge, SMITH and BARKSDALE, Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition

for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. Smith

United States Circuit Judge

REHG-8

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX B

Ernest D. SHARP,
Plaintiff-Appellant,

Wausau Insurance Company,
Intervenor-Appellant,

v.

JOHNSON BROTHERS CORPORATION,
St. Paul Fire & Marine Insurance Co.,
and Centennial Insurance Company,
Defendants-Appellees.

No. 91-3690

United States Court of Appeals,
Fifth Circuit.

Sept. 25, 1992.

Worker injured during reconstruction of train bridge spanning lake when crane installed on barge dropped load of angle iron on him brought action under Jones Act against his employer and insurers. The United States District Court, Eastern District of Louisiana, George Arceneaux, Jr., J., 719 F.Supp. 516, directed verdict against worker on seaman status issue. Thereafter, the District Court granted primary protection and indemnity insurer's motion for summary judgment on excess insurer's cross claim for reimbursement of defense costs. Appeals were taken. The Court of Appeals, 917 F.2d 885, reversed and remanded. Following amendment of opinion on denial of rehearing, 923 F.2d 46, the District Court

dismissed worker's Jones Act claim, and appeals were taken. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that compensation order issued by administrative law judge pursuant to Longshore and Harbor Workers' Compensation Act (LHWCA) ratifying settlement agreement of compensation claim constitutes "formal award" barring injured party from bringing Jones Act suit for same injuries.

Affirmed.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before POLITZ, Chief Judge, SMITH and BARKSDALE, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Earnest D. Sharp, an employee of Johnson Brothers Corporation ("Johnson Brothers"), was injured while performing bridge repair work and filed suit under the Jones Act, 46 U.S.C.App. § 688, and a claim under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.* He eventually reached a settlement with Johnson Brothers and its compensation insurer, the Wausau Insurance Companies (Wausau), under the LHWCA. Pursuant to the LHWCA, an administrative law judge ("ALJ") of the Department of Labor (DOL) entered an order approving the settlement and discharging Johnson Brothers and Wausau upon its payment. The district court then dismissed Sharp's Jones Act claim, holding that the election of his LHWCA remedy precluded Jones Act relief. We affirm.

I.

Sharp was a welder/pile driver for Johnson Brothers, helping to replace a railroad drawbridge over Lake Pontchartrain. He worked aboard a fleet of barges that Johnson Brothers had chartered. In November 1985, a crane dropped a load of iron on him while he worked on a tugboat in the lake, injuring his back, knee, and ankle. Johnson Brothers had obtained protection and indemnity insurance for the tug from St. Paul Fire & Marine Insurance Co. ("St. Paul"), which provided excess coverage on the barges, which also were insured by Centennial Insurance Company ("Centennial").

Johnson Brothers initiated compensation proceedings, filing a notice with the DOL, which issued a letter informing Johnson Brothers that Sharp's injury fell "within the purview" of the LHWCA and that Johnson Brothers had filed a tardy accident report. The DOL also notified Sharp that his injury "appear[ed] to fall under the jurisdiction of the [LHWCA]." Johnson Brothers then began to pay Sharp the benefits he would be due under the LHWCA.

Sharp filed a Jones Act suit in November 1986. In 1987 Johnson Brothers terminated his harbor worker benefits, and Sharp filed an LHWCA claim with the DOL. Johnson and Wausau raised the defense that Sharp was a Jones Act seaman and thus not eligible for longshore compensation.

After four continuances and a trial, the district court granted a directed verdict against Sharp on his Jones Act claim in June 1989 on the grounds that the barges were not vessels and that he was not a seaman. Sharp filed a timely notice of appeal in October 1989.

In September 1989, though, Sharp, Johnson Brothers, and Wausau settled Sharp's LHWCA claim, agreeing that Sharp would receive $225,000 and in return would release Wausau completely and would release Johnson Brothers to the extent that it was uninsured by Centennial and St. Paul. A final release was executed on October 5, 1989, and an ALJ approved the settlement pursuant to the LHWCA, 33 U.S.C. § 908(i)(1). St Paul and Centennial assert that they knew nothing of the settlement at that time.

This court heard oral argument on the appeal of the district court's directed verdict in August 1990, and, inexplicably, no one representing Sharp, Wausau, or Johnson Brothers mentioned the settlement. In November 1990, we reversed the district court on the ground that a fact question existed as to whether Sharp worked aboard a fleet of vessels and thus was a seaman *Sharp v. Johnson Bros. Corp.* 917 F.2d 885 (5th Cir.1990).

In August 1991, the district court granted summary judgment against Sharp, holding that, since as a consequence of the settlement he had elected his remedy as a harbor worker, he had no right of direct action against either of the indemnity insurers, St. Paul or Centennial, and that Johnson Brothers had violated its duty of cooperation with its insurers.[1]

II.

A.

The district court ruled that the settlement the DOL

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[1] As we conclude that the court did not err in barring Sharp's Jones Act proceeding, we do not consider the additional bases for the district court's decision.

approved constituted an election of remedies and precluded the filing of a suit based upon general maritime law or the Jones Act. It based its decision upon *Vilanova v. United States*, 851 F.2d 1, 4 (1st Cir.1988) (Wisdom, J., sitting by designation), *cert. denied*, 488 U.S. 1016, 109 S.Ct. 811, 102 L.Ed.2d 801 (1989), which states that Congress did not intend to give injured workers two chances to maximize their compensation award. The district court reasoned that the entry of an order by the ALJ constituted a finding that the injuries were compensable under the LHWCA and that by seeking, and acquiescing to, the finding, Sharp is collaterally estopped from contesting LHWCA coverage.

B.

Sharp argues that the district misunderstood what occurred. He argues that because there is a "zone of uncertainty" between the Jones Act and the LHWCA, an injured worker may pursue both remedies simultaneously. *See Simms v. Valley Line Co.*, 709 F.2d 409, 412 (5th Cir.1983). He also points to a number of commentators who argue that a worker should be able to accept benefits without losing his Jones Act claim, since the purpose of the compensation and recovery schemes is to protect the worker during his time of need. *See id.* (citing treatises). Further, there is no danger of double recovery, as one recovery is credited against the other.

Sharp further argues that collateral estoppel should not apply, because the issue of whether he was a seaman or a harbor worker was not litigated; only a consent judgment was entered in his case. According to Sharp, a consent judgment does not give rise to estoppel, as the issues underlying the judgment are neither actually litigated nor necessary and essential to the judgment. *See Hughes v. Santa Fe Int'l Corp.*, 847 F.2d 239 (5th Cir.1988) (finding no

issue preclusion). According to Sharp, the ALJ reviewed the agreement only for fairness, not jurisdiction.

Sharp calls our attention to *Southwest Marine v. Gizoni*, ____ U.S. ____, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991), issued shortly before he filed his opening brief. In *Gizoni*, a rigging foreman who worked on floating platforms and sometimes did seaman's work was injured. He submitted a claim for, and received, medical and compensation benefits from Southwest Marine under the LHWCA and then sued under the Jones Act, alleging that he was a seaman injured by his employer's negligence. The district court granted summary judgment because he was not a seaman and because he was a harbor worker precluded by the exclusive remedy provisions of the LHWCA from bringing his action. The Ninth Circuit reversed, saying Gizoni's status was an issue of fact and that the LHWCA does not cover seamen, so he might be eligible for a Jones Act award. *Gizoni v. Southwest Marine*, 909 F.2d 385 (9th Cir.1990).

The Supreme Court affirmed the court of appeals, reasoning that the two statutory compensation regimes are mutually exclusive and that a maritime worker is limited to LHWCA remedies only if no genuine fact issue exists as to whether he is a Jones Act seaman. ____ U.S. ____, 112 S.Ct. at 492. The Court also stated that it found no indication in the LHWCA that Congress intended to preclude or stay traditional Jones Act suits in the district courts. *Id.* at ____, 112 S.Ct. at 493.

Most relevantly for the instant appeal, the Court stated that is is "universally accepted" that an employee who receives voluntary payments under the LHWCA without a formal award is not barred from subsequently seeking relief under the Jones Act, because "quite

obviously" the question of coverage has never actually been litigated. *Id.* at ____, 112 S.Ct. at 493-94. The Court observed that because the LHWCA provides that any amounts paid under the Jones Act shall be credited against any liablity imposed under the LHWCA, the LHWCA does not comprehend a preclusive effect. Finally, the court rejected an estoppel argument, since there is no threat of double recovery, stating that the estoppel argument "would force injured maritime workers to an election of remedies we do not believe Congress to have intended." *Id.* at ____ n. 5, 112 S.Ct. at 494 n. 5.

C.

Johnson Brothers, St. Paul, and Centennial distinguish *Gizoni* on the basis that the Court states that "voluntary payments under the LHWCA without a formal award" do not bar Jones Act relief but that here the filed settlement agreement of a compensation claim does constitute a "formal award." We agree.

It is beyond cavil that merely accepting voluntary payments under the LHWCA without a formal award does not bar a worker from filing a Jones Act suit. *See id.* at ____, 112 S.Ct. at 493: *see also Boatel, Inc. v. Delamore,* 379 F.2d 850 (5th Cir.1967). Here, though, Sharp obtained a settlement agreement and a compensation order issued by the ALJ. We have treated such an agreement and order as a "formal award ." *See Newkirk v. Keys Offshore,* 782 F.2d 499, 501-02 (5th Cir.1986); *see also Rodriguez v. Compass Shipping Co.,* 617 F.2d 955, 958-59 (2d Cir.1980), *aff'd,* 451 U.S. 596, 101 S.Ct. 1945, 68 L.Ed.2d 472 (1981).

Sharp argues that the settlement agreement does not dispose of the issue of coverage. In *Simms,* 709 F.2d at 412, cited in *Gizoni,* we quoted legal scholars who argued that

even the payment of benefits pursuant to a formal award in a contested proceeding might not be fatal to a Jones Act action if the compensation award was made without a proper adjudication of the claimant's status as a harbor worker. *Id.* at 412 n. 5. We never reached that issue, however, as we dismissed the petitioner's appeal as premature.

It is true that LHWCA coverage was never litigated in an adversarial proceeding. But Sharp availed himself of the statutory machinery to bargain for an award, and he had the full opportunity to argue for (or against) coverage. He filed a claim for LHWCA benefits, invoking the jurisdiction of the DOL. Pursuant to 33 U.S.C. § 908(i)(1), the ALJ considered Sharp's testimony, as well as the parties' stipulations and their settlement, before issuing its findings of fact and order extinguishing Johnson Brothers' and Wausau's liability for LHWCA benefits.

Having obtained the order of the ALJ and the aegis of the DOL to ratify and enforce his settlement, Sharp ensured that his rights were more secure under the agreement than they would have been if the settlement were considered merely a contract between the parties.[2] It follows that where the ALJ issues a compensation order ratifying a settlement agreement, a "formal award" should be deemed to have been made under *Gizoni,* and the injured party no longer may bring a Jones Act suit for the same injuries.

Our holding is consistent with the purpose of the LHWCA, as outlined in *Fontenot v. AWI, Inc.,* 923 F.2d 1127 (5th Cir.1991). The LHWCA was not designed to

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[2] In notifying the parties of the ALJ's ruling, the Deputy Commissioner of the DOL informed them that if the employer/insurance carrier failed to pay the compensation award within 10 days, it would be liable for an additional 20%.

create a mere safety net, guaranteeing workers a minimum award as they seek greater rewards in court. Rather, it has a benefit to employers, too, giving them limited and predictable liability in exchange for their giving up their ability to defend tort actions. *Id.* at 1132 (*quoting Morrison-Knudsen Constr. Co. v. Director, Office of Worker Compensation Programs,* 461 U.S. 624, 636, 103 S.Ct. 2045, 2052, 76 L.Ed.2d 194 (1983)). Permitting a Jones Act proceeding after a formal compensation award here would defeat the purpose of the LHWCA, as well as work unfairness, because, as here, employers often have different insurance carriers for workers' compensation claims and tort claims, so the compensation insurer, by guaranteeing a minimum award, necessarily would reduce the ability of the tort insurer to effect a settlement.

Nor is our holding inconsistent with *Gizoni.* In that case the Court held that an injured maritime worker did not have to choose between pursuing his potential remedies under the LHWCA and the Jones Act. There is a difference, though, between saying a plaintiff may *pursue* only one remedy and declaring that he may *receive* only one award.

We agree that Congress did not intend that a worker forfeit his right to pursue one remedy when he pursues another. Otherwise, a plaintiff might fail to receive a LHWCA award, because the ALJ considered him a seaman, but be barred from Jones Act relief because he pursued what he believed were his remedies under the LHWCA.

Nor should an employer be able to avoid Jones Act liability by voluntarily paying LHWCA benefits that a needy worker cannot but accept while awaiting trial. *See Gizoni,* ____ U.S. at ____, 112 S.Ct. at 493; *Tipton v.*

Socony Mobil Oil Co., 375 U.S. 34, 37, 84 S.Ct. 1, 3, 11 L.Ed.2d 4 (1963). But Congress did not intend that the worker be able to pick and choose his remedy based upon which has conferred upon him a larger award. That is, the LHWCA was not intended to be a "stepping stone on the way to a jury award." *Fontenot*, 923 F.2d at 1133.[3]

The judgment of the district court is AFFIRMED.

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[3] As a final note, we are distressed by the conduct of the attorneys for Sharp, Johnson Brothers, and Wausau during the previous appeal. Although we have no basis upon which to ascertain their motives, we are surprised that the parties failed to bring to our attention the fact that they had settled at least one aspect of their dispute. We recognize that counsel may legitimately have believed that the LHWCA settlement was irrelevant to the Jones Act action. Nevertheless, candor and respect for this court would dictate that the parties inform us of so significant a development in their litigation.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ERNEST D. SHARP	CIVIL ACTION
VERSUS	NO. 86-5005
JOHNSON BROTHERS CORPORATION, ET AL	SECTION "K"

MOTIONS HEARD ON JUNE 26, 1991
BEFORE THE HONORABLE
GEORGE ARCENEAUX, JR.
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by mechanical stenography. Transcript produced by computer aided transcription.

PROCEEDINGS

THE COURT: Okay. Well, I'm prepared to rule, counsel. Anybody want to say anything else? Is that Mr. Sharp in court, in the courtroom?

MR. GALATAS: Yes, Your Honor.

THE COURT: Mr. Sharp, this is lawyer talk, but I want you to know, sir, that you were well-represented, and Mr. Galatas did nothing more than any good plaintiff's lawyer would have sought to do under the circumstances. The Court quarrels with maybe the ways in which he did some of it. but you have been well-represented, I think, and don't you ever think you weren't.

All right. Let's deal now with, first of all, the motion for summary judgment — two, really, motion for summary judgment and motion to conduct discovery which is filed by Centennial. And breaking that in half and dealing also with the motion for summary judgment which is filed on behalf of, interestingly enough, Johnson Brothers and St. Paul, by The St. Paul. I guess you realize now that you may have a small problem with your representation of Johnson Brothers, Mr. Maginnis.

MR. MAGINNIS: I don't think so, your Honor. We tried to overcome any potential obstacles or conflict by virtue of Mr. Knowles' representation independently and solely for St. Paul. Danny Knowles is counsel for St. Paul. We, on the other hand, represent the interests of Johnson Brothers and St. Paul through their excess P & I policy, and only within those limitations.

THE COURT: They don't have any exposure. Their exposure is all yours. Johnson Brothers has stipulated that out in Ms. Haecker-Ryan's release.

MR. MAGINNIS: That's a point we argued, your Honor. I want to point out further that we have an excess policy compared to Centennial's $1 million primary policy.

MR. GUILBEAU: I don't know if everyone has fully understood the all the ramifications of coverage. What Mr. Maginnis described, I agree with him. He still represents that interest of Johnson Brothers. Interestingly enough, Johnson Brothers still has to cooperate with him pursuant to that interest.

THE COURT: Come on. That's like saying that Saddam Hussein has got to cooperate with the Kuwaites, it's easy said.

MR. GUILBEAU: I understand your analogy, but Johnson Brothers, before settlement they cooperated with Mr. Maginnis in supplying witnesses and working with him. It was always to their detriment, and they did it anyway. Nothing has really changed. they just protected themselves.

THE COURT: They did that to their detriment when they were insured.

MR. GUILBEAU: They weren't necessarily insured, Judge. They were reserving rights. That's what Mr. Knowles is here to do. He's defending the paper, sir. Nothing has changed.

THE COURT: Mr. Guilbeau, I've heard enough from you. I'm going to grant the motions insofar as these two parties are concerned for summary judgment. One, the Court, as I have held in Pereira, and as other judges of this Court have also held, there is no direct action against either one of these parties. Secondly, I think that the settlement with the Department of Labor constitutes an election of remedies and precludes the filing of a suit on claims based on general maritime law or the Jones Act or Section 905(b). Vilanova versus the United States, I think controls, and certainly this is the thread that I find running through other Fifth Circuit opinions. But Judge Wisdom as the organ of the Court in this First Circuit case, I don't think could have put it any better than he says that it was not intended to give injured workers two chances to maximize their compensation award. And then, bearing in mind that Vilanova's settlement, the Court distinguished from his application for benefits, as was the situation here. And the Court noted that as is required by the Longshore and Harbor Workers' Compensation Act, 333 USC 908(i), which is the section relied upon by the administrative law judge in entering his order, the administrative law judge reviewed Vilanova's settlement and found it compensable under the act. Obviously the law judge believed he had jurisdiction and exercised that jurisdiction in order to confect the award.

Finally in Vilanova, "Here by seeking and then signing the settlement, Vilanova solicited and then acquiesced in the Department of Labor's finding that his injuries are compensable." And this goes even further. It refers to he

is collaterally estopped from contesting Longshoreman and Harbor Worker Act coverage. Finally — thirdly, rather. I have a hard time finding a remaining claim against the insurers. These are indemnity policies. The claims — there is no claim against Johnson Brothers. Johnson Brothers is completely relieved of liability, as I read these various settlement documents, only to the extent that Johnson Brothers might be insured. So there has got to be a time when a liability on an insured having been terminated, and the insurer's responsibility being vicarious and derivative, should be deemed to have terminated as well. And I so find here.

Finally, we talked early on this morning about the cooperation of these parties. Whether or not you produce witnesses, whether or not you provide documentary evidence, whether or not a party does other things, the cooperation clause also carries with it the obligation not to affirmatively do something which would be damaging to the defense which your insurers are undertaking, or, in the case of Centennial, which they have refused to undertake, but well might owe. The record in this case, the settlement documents, are replete with circumstances which are prejucidial to the Jones Act insurers, and the general maritime law insurers. One, there is a clear stipulation as to vessel status. Secondly, in effect there has been a $200,000 lien stipulated. thirdly, that self-serving opening statement that deals with not only a fleet of vessels, but the declaration that, had Sharp's claims been presented to a jury, more likely than not the jury would have determined the plaintiff a seaman, entitled to seaman's remedies, would be extremely damaging and hurtful to these parties on a trial.

The Court has attempted to do its best to overlook the snide references to the continuances. That snide, S-N-I-D-E, language such as none of the continuances were re-

quested by Sharp, that's true, of course, but there were at lest several caused by him or his counsel. This entire picture that's sought to be painted is one which the Court is concerned with insofar as it deals with the relationship of lawyers and the kind of honor which this Court perhaps in its old fashioned sense of propriety continues to expect from members of its bar.

The Court also notes that in these documents there is a statement — "There is a substantial reason for termination of Sharp's benefits by the employer carrier was the recognition of the merits of his claim to seaman status. Sharp has a bona fide, good faith claims to seaman status and is entitled to have a jury decide it." A statement that St. Paul and Centennial refused to negotiate an arrangement to pay weekly benefits and medicals. These are good words to include in a settlement. The Court has got no problem with them. The difficulty comes in my perception of the insured's requirement to cooperate, presenting them in such a fashion that they are going to be read to a jury perhaps under circumstances where only Johnson Brothers is a named party and are extremely damaging, indeed so much so that the Court finds that they would severly prejudice the defense.

The motion to conduct discovery filed by Centennial is granted. I think we have some problems here that I have just indicated in the coverage issues that need to be ventilated.

The motion to amend answers filed by Centennial, the Court grants. These are in the third party claims and so forth that the court thinks present facts that were not known or could have been with due diligence made known at the time the original answers were filed, and the amendment should be permitted.

The motion for leave to file amended answer by Johnson Brothers and St. Paul is likewise granted for those same reasons. The motion St. Paul for leave to file a supplemental and amended third party complaint as to the Centennial issue is likewise granted. I think all that does is formalize an issue which was presented in the original pretrial order on page 12 which dealt with specific issues between Centennial and St. Paul.

The motion for leave to amend the plaintiff's maritime complaint to add a 905(b) claim is denied. That claim is pending. There is a similar complaint in state court which was filed on November 23rd, 1988. The Court observes that certainly that was before this matter went to trial in this case, and to wait until the case has gone to the Court of Appeals, and then come back, to attempt to exert a claim that was there and actually had been exerted in the state court suit is not the kind of circumstances the Court finds would permit it, even if it wanted to, to permit it to grant the motion to amend. And I don't want to. I think it's within my discretion, and I think this case has gone on long enough. We can Ping-pong ball the case back and forth between this district and the Court of Appeal forever, if we keep adding claims as the case comes back.

Finally, I have given all the parties ample grounds for appeal. I hope, I pray, I urge parties to appeal this Court on these issues, because when you get there, I want you to be abundantly frank with the Fifth Circuit. I want the circuit to understand exactly how all of this came about, and the fact that they heard oral argument in a case which had been at least partially settled, the partial settlement presenting implications to their decision-making process, at least indirectly if not directly. But I think as a matter of common courtesy, counsel owed it to my colleagues on the Fifth Circuit Court of Appeals to tell them

about the settlement. Then it becomes their decision as to what implications, if any, that settlement may have.

Finally, I cannot, as I have said, fault counsel specifically for any actual default in their professional responsibilities. I do think as members of the bar this has been an exercise in sorry conduct. One of you clerked for this Court. I have known all of you for a number of years. I can say to you only that I am disappointed in the way you have comported yourselves. And I hope it doesn't happen again. Frankness, if it's prejudicial, is harmful, But frankness and disclosure where such things would present the other side a fair opportunity to do whatever they have to do to represent their clients has got to be demanded.

I had an old law partner who told me once, counsel, Hey, we're not selling cans of peas. There is nothing disgraceful about being a grocer. But we're not grocers. We're lawyers. The public expects more of us than what I have seen displayed in this case. But more importantly, you expect more from each other.

The Court will stand adjourned, Mr. Clerk.

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Delmer R. Simpson

Delmer R. Simpson, CSR Date

APPENDIX D

UNITED STATES DEPARTMENT OF LABOR EMPLOYMENT STANDARDS OF WORK ADMINISTRATION OFFICE OF WORKERS' COMPENSATION SEVENTH COMPENSATION DISTRICT

IN THE MATTER OF A CLAIM UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT	**AGREED SETTLEMENT PURSUANT TO SECTION 8 (i) OF THE ACT AND COMPENSATION ORDER APPROVING AGREED SETTLEMENT**
ERNEST D. SHARP Claimant/Employee	
VERSUS	**OWCP NO: 7-102714**
JOHNSON BROTHERS CORPORATION Employer	**ALJ NO: 88-LHC-1458**
AND	
EMPLOYERS INSURANCE OF WAUSAU Insurance Company	

The parties hereto, Ernest D. Sharp, employee, Johnson Brothers Corporation, Employer, and Employers Insurance of Wausau, carrier, have reached an agreement for the settlement of this claim on a lump sum basis pursuant to Section 8 (i) of the Longshore and Harbor

Workers' Compensation Act ("LHWCA"), and as a basis for said agreed settlement, the parties submit the following opening statement and stipulations:

I. OPENING STATEMENT

This claim arises out of an accident to Ernest D. Sharp on November 29, 1985 while employed by Johnson Brothers Corporation. Sharp was working at all pertinent times on a construction project involving the replacement of the draw bridge on Southern Railroad's Lake Pontchartrain's trestle. In order to perform this work, Johnson Brothers obtained a fleet of vessels consisting of one tug, one crew boat, two material barges, two spud barges and an unspecified number of small work boats. One spud barge, the JG-204, had a Manitowac crane fixed to its deck. This crane was used mainly for lifting. The other spud barge, CMS-206, had an American pile-driving crane mounted upon it. The pile-driving crew, of which Sharp was a member, worked at times on the tug, the crane barges, the material barges and the other vessels involved in the project as well as on the trestle itself. Sharp performed a substantial portion of his duties aboard the various vessels. At times, he operated the tug boat. More frequently, he directed the movement of the tug boat and spud barges.

The accident occurred on November 29, 1985. while Mr. Sharp was working at the bow of the tug boat, a load being transferred by the Manitowac crane on the JG-204 dropped upon him. As a result, Sharp suffered multiple injuries to his back, knee and ankle.

The undersigned parties concede that the various barges, the tug, the crew boat and the other small work

boats are all vessels for maritime purposes. All parties recognize that Sharp's legal status, because of his amphibious duties, cannot be easily characterized in terms of "Jones Act seaman", "maritime employee" entitled to benefits under the LHWCA, and/or a state worker. The undersigned parties contend that Sharp is the type of worker who should be allowed to have his status determined by a jury, if he so desires. The undersigned parties also recognize that had a jury determined that Sharp was not a Jones Act seaman then it would be most probable that he would be considered a maritime employee entitled to recover benefits under the LHWCA. The parties hereto acknowledge that Sharp did all within his power to have this issue determined by a jury but was denied that opportunity.

Sharp filed suit on November 13, 1986 claiming entitlement to a seaman's remedies under the Jones Act and general maritime law. That suit was filed in the United States District Court for the Eastern District of Louisiana, Civil Action No. 86-5005, Section "K" and was entitled "Ernest D. Sharp versus Johnson Brothers Corporation, et al." It was not tried until two years and seven months later on June 12, 1989. The case was continued four times. It was originally set for trial June 19, 1987. It was then continued and reset for trial on March 21, 1988. The case was subsequently continued again and reset for trial on August 15, 1988. The undersigned parties concede that these first two continuances were no doubt prompted in part by the addition as defendants of two reputed marine insurers of Johnson Brothers Corporation, Centennial Insurance Company and St. Paul Fire and Marine Insurance Company. Each of these insurers issued a Protection and Indemnity policy ("P&I" policy) which provided certain marine converages to Johnson Brothers through operation of certain of the vessels involved in the bridge trestle project.

Coverage and the nature of coverage was vigorously contested by these two P&I carriers throughout the litigtion.

Various claims were filed among the P&I carriers and Employers Insurance of Wausau. None of the continuances were requested by Ernest D. Sharp. The continuances continued. The March 21, 1988 trial date was continued and reset for August 15, 1988, which happened to fall during the week of the Republican National Convention. As the Republican National Convention approached, counsel were advised that no jury trials would be held during the week of the convention because of the virtual impossibility of the jury venire's accessing the federal courthouse on Camp Street in New Orleans. The court continued the trial from August 15, 1988 and reset it on November 14, 1988. This fourth trial setting marked the three year anniversary of Sharp's accident and two year anniversary of his filing suit. On its own motion, the court continued the trial from November 14, 1988 and reset it on June 12, 1989. Plaintiff's request for an expedited trial date before June 12, 1989. Plaintiff's request for an expedited trial date before June 12, 1989 was denied.

Meanwhile, Ernest Sharp had not received any weekly benefits since these were terminated in August of 1987. The benefits were terminated by Wausau for the reasons set forth in the LS-207 "A", Notice of Controversion of Right to Compensation, which form is attached hereto as Exhibit "A." A substantial reason for termination of Sharp's benefits by the employer/carrier was the recognition of the merits of his claim to seaman status which would preclude recovery under the LHWCA. The undersigned parties acknowledge that Sharp has a bona fide, good faith claim to seaman's status and he is entitled to have a jury decide it. Unfortunately, all attempts by the employer/carrier to negotiate an arrangement regarding

payment of appropriate weekly benefits and payment of medical expenses to or on behalf of Sharp with Johnson Brothers' others carriers, those being St. Paul and Centennial, were refused by those carriers. As a result, Sharp fell into extreme financial hardship during the period between August of 1987 and June 12, 1989, when his federal case was finally tried.

When the case was finally tried, the court did not allow the jury to determine whether Sharp was a seaman, but rather, directed a verdict dismissing his case. The undersigned parties contend that the ruling was incorrect as a matter of law and erroneous in view of the facts presented at the trial. The undersigned parties submit that had Sharp's claim been submitted to the jury, it is more likely than not that the jury would have determined that Sharp was a Jones Act seaman entitled to a seaman's remedies.

Accordingly, this application is not to be construed as an admission of liability or with respect to the ultimate determination of Sharp's status as a Jones Act seaman, maritime employee or otherwise. To the contrary, the undersigned parties specifically acknowledge that the issue of whether Sharp is a Jones Act seaman or not would be as vigorously contested at the formal hearing as it was at the federal trial.

It is understood and agreed by the parties hereto that had this case proceeded to formal hearing, the following issues would have been contested:

a. Jurisdiction.

b. Claimant's status as a maritime employee entitled to LHWCA benefits.

c. The nature and extent of claimant's disability.

d. Entitlement to any additional compensation benefits/ability to return to gainful employment.

II. *SETTLEMENT APPLICATION*

Ernest Sharp was employed by Johnson Brothers Corporation on November 29, 1985. On that date while Sharp was working on the bow of a tug boat, an overhead load of angle iron being moved by a barge-mounted crane fell upon him causing injuries to his left knee, ankle and lower back.

2. Written notice was given within 30 days of the injury.

3. Employee first received treatment at the emergency room at Slidell Memorial Hospital. His primary treating physician is Dr. Charles Krieger, an orthopaedic surgeon.

As a result of his accident of November 29, 1985, the Claimant suffered proliferative panniculitis of the left knee and chronic left quadriceps tendinitis. On January 23, 1986, Mr. Sharp underwent surgery by Dr. Charles Krieger for excision of a nodular mass from the left knee. Surgery was followed by physical therapy and periodic aspirations of synovial fluid. These conditions resolved by April 14, 1986.

As a further result of his accident, the claimant suffered a sprained ankle and posterior tibial tendinitis. The ankle sprain resolved by April 14, 1986. The tibial

tendinitis was treated by physical therapy and cast immobilization. This condition resolved by June 10, 1986.

Additionally, as a result of his accident of November 29, 1985, Mr. Sharp suffered an injury to his lower back. By clinical examination and by the use of CT-scan and myelogram, Dr. Charles Krieger diagnosed a herniated disc at L5-S1 and thereupon recommended surgery. At the request of the employer, Dr. Michael Carey of LSU Medical Center examined the claimant and reviewed the tests and agreed that surgery was necessary.

On September 29, 1986, the claimant underwent back surgery by Dr. Krieger. Surgery revealed a herniated disc at the L5-S1 space which was compressing the S1 nerve root. A radical bilateral discectomy was performed.

It is the claimant's contention that he has not yet reached maximum medical cure. He is still under the active care of Dr. Krieger, who has not released him. Second opinions have been obtained from Dr. Bernard Manale. Subsequent MRI tests have been performed as recently as March 28, 1989, and these reveal degenerative discs at L4-5 and L5-S1 with herniation at the L4-5 level.

Surgery in the future is possible, including a fusion for segmental instability. For now, the treating physicians have recommended epidural morphine injections and inpatient treatment at a pain clinic.

In August of 1987 Dr. Gernon Brown examined employee and found him fit to return to light duty work. Employee has not been released to perform any type of work by Dr. Krieger who is of the opinion that employee has a 25% permanent partial disability of the lower back. Whether employee has reached maximum medical improve-

ment with respect to his back is a contested issued between the employer/carrier and employee.

Employee is also being treated for his back problems by Dr. Bernard Manale, an orthopaedic surgeon. Dr. Manale has detected some clinical finding in Sharp's lower back, but is recommending that employee be treated with epidural injections.

4. Employee's average weekly wage at the time of injury was $654.00 per week, with a corresponding compensation rate of $436.25 per week.

5. As a result of the accident and injury, the employee was paid temporary total disability benefits from the date of the accident through August 28, 1987, a period of 91 weeks, for a total payment of $39,698.75. The employer/carrier also paid medical expenses in the amount $35,661.86. Benefits were terminated at that time based upon the opinion of Dr. Gernon Brown and the support for the employer/carrier's contention that Sharp was a seaman.

6. There is a dispute regarding whether employee has reached maximum medical cure. The employer/carrier contend that employee reached maximum medical improvement on or about August 19, 1987. Employee contends that he has not yet reached maximum medical improvement with respect to his back condition and may be in need of future treatment, including possible future surgery. Employee has not returned to any type of gainful employment since his accident.

Employee is 38 years old. He is a high school graduate. He has mechanical and welding skills which he has gained through employment as a semi-skilled manual

laborer throughout his life time.

7. The parties do not wish to pursue this matter to a formal hearing in light of the significant, well-grounded dispute over the controverted issued including: employee's status, jurisdiction, the nature and extent of any disability, and whether he is capable of returning to gainful employment.

8. The parties hereto have agreed to settle all claims in this matter for a lump sum payment of TWO HUNDRED THOUSAND AND NO/100 ($200,000.00) DOLLARS, including all claims for past and future compensation benefits, past and future medical expenses and for rehabilitation. In light of the serious factual, legal, monetary, and medical disputes involved in this matter, the proposed settlement amount is stipulated as fair, reasonable, and is acceptable and agreeable to all of the parties.

Furthermore, by way of a separate agreement among the parties hereto, Sharp will receive an additional TWENTY FIVE THOUSAND AND NO/100 ($25,000.00) DOLLARS in settlement of any non-statutory (i.e., other than compensation) claims he may have against the parties based upon maritime tort. That agreement will be the subject of a separate writing not before this tribunal, but the parties wish to advise this tribunal of the existence of this separate, binding agreement among the parties hereto.

This proposal includes the settlement of all future medical expenses. Over the course of the last year employee has incurred approximately $6,000.00 in medical expenses. Future surgery of any type is not imminent. Whether employee will undergo future surgery is a contested issued between employee and the employer/carrier.

9. Employee's counsel has waived the right to claim an attorney's fee in this matter. The total amount of $225,000.00 which is to be paid by the aforementioned separate agreement is guaranteed to employee.

10. Approval and payment of this settlement will discharge the employer and carrier of liability for the payment of any further compensation, be it for temporary or permanent, total or partial disability and for any past due or future medical expenses or any other benefits for liability under the LHWCA as a result of employee's injury of November 28, 1985.

11. Employee attests that this settlement has not been procured by the duress.

12. The parties submit this settlement application for all future compensation and medical benefits which claimant may otherwise be entitled to receive under the provisions of the Longshore and Harbors Workers' Compensation Act. The parties agree and understand that if the settlement agreement is not specifically disapproved by the Deputy Commissioner within thirty (30) days after receipt and no compensation Order of Notice of Deficiency is issued within such time, the settlement agreement shall be deemed approved and the payment thereunder shall be made pursuant to Section 914(f) of the LHWCA.

9/21/89
DATE

/s/ Ernest D. Sharp
ERNEST D. SHARP
Claimant/Employee

9/21/89
DATE

/s/ Kevin Galatas
KEVIN GALATAS
Attorney for Claimant

September 21, 1989
DATE

/s/ Joseph B. Guilbeau
JOSEPH B. GUILBEAU
Sutherland & Juge
639 Loyola Avenue,
Suite 1300
One Poydras Plaza
New Orleans, LA 70113
(504) 525-2126
Attorney for Johnson
Brothers Corporation and
Employers Insurance of
Wausau

ORDER OF APPROVAL

The undersigned Administrative Law Judge, pursuant to the provisions of Section 8(i) of the Longshore and Harbor Workers' Compensation Act, having considered the foregoing stipulations and agreed settlement, together with the testimony of Ernest D. Sharp, makes the following:

FINDINGS OF FACT

1. The agreed settlement is adequate and not procured by duress;

2. Settlement in the amount of TWO HUNDRED THOUSAND AND NO/100 ($200,000.00) DOLLARS set forth in the stipulation is hereby approved, and the parties are directed to carry out the requirements of the settlement;

3. The liability of the employer and carrier for all payments of compensation and medical expenses under the

Longshore and Harbor Workers' Compensation Act as a result of Ernest D. Sharp's accident and injuries of November 29, 1985 will be discharged upon payment of the agreed upon sums.

ORDER

1. It is hereby ordered that the employer and carrier shall forthwith pay all amounts in accordance with the provisions of this agreed settlement.

2. Upon payment of the amount specified above, the liability of the employer and carrier to pay compensation and medical benefits to claimant for any and all injuries sustained by claimant on or about November 29, 1985 shall be released and discharged.

GIVEN UNDER MY HAND at Metairie, Louisiana, this 21st day of September, 1989.

/s/ Richard D. Mills

RICHARD D. MILLS
ADMINISTRATIVE LAW JUDGE

PROOF OF SERVICE

I certify that on February 9, 1993, the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, Seventh Compensation District and that a copy thereof was mailed on said date to the parties at the last known address of each as follows:

CLAIMANT	Ernest D. Sharp Rt. 15, Box 382 Slidell, LA 70461
CARRIER:	Employers Insurance of Wausau P. O. Box 7033 Metairie, LA 70010
CLAIMANT'S ATTORNEY:	Kevin Galatas 8654 Pontchartrain Blvd., #3 New Orleans, LA 70124
EMPLOYER/CARRIER'S ATTORNEY:	Joseph B. Guilbeau Sutherland & Juge 639 Loyola Avenue, Suite 1300 One Poydras Plaza New Orleans, LA 70113 (504) 525-2126

DONNETTE S. GLENN
DEPUTY COMMISSIONER
SEVENTH COMPENSATION DISTRICT
UNITED STATES DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION OFFICE OF WORKERS' COMPENSATION PROGRAMS

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
MAR 9 1993
OFFICE OF THE CLERK

NO. 92-1349

In the Supreme Court of the United States

OCTOBER TERM, 1992

ERNEST D. SHARP,
Petitioner

Versus

JOHNSON BROTHERS CORPORATION, et al.,
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

MICHAEL J. MAGINNIS*
(La. Bar Roll No. 8862)
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ATTORNEYS FOR RESPONDENTS,
JOHNSON BROTHERS CORPORATION and ST. PAUL FIRE & MARINE INSURANCE CO.

* Counsel of Record

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QUESTION PRESENTED

The question presented raises no conflict with the established law of the United States Supreme Court or any lower court:

Whether a "formal award" was issued by the Administrative Law Judge, after pursuit by a maritime worker of Longshore and Harbor Workers' benefits, which constitutes an election of remedies by the maritime worker.

LIST OF PARTIES

The parites to the proceedings below were the petitioner, Ernest D. Sharp, and respondents, Johnson Brothers Corporation, and Centennial Insurance Companies and St. Paul Fire & Marine Insurance Company (as alleged insurers of Johnson Brothers Corporation). Wausau Insurance Company appeared as an intervenor in the proceeding below, but is not a party to these proceedings.

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IN THE SUPREME COURT OF THE UNITED STATES

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ATTORNEYS FOR RESPONDENTS,
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Respondent respectfully prays that petitioner's Application for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above and entitled proceeding on September 25, 1992, with subsequent rehearing denial on November 10, 1992, be denied.

STATEMENT OF THE CASE

In the interest of brevity, and pursuant to Supreme Court Rule 24.2, respondent clarifies the following particular facts:

On September 21, 1989, on the eve of a scheduled longshore hearing, Ernest Sharp, Johnson Brothers Corporation, and Wausau Insurance Company obtained a "formal award" and settlement funds whereby Ernest Sharp received $200,000.00 in settlement of his claims presented under the Longshore and Harbor Workers' Compensation Act. Respondents, Johnson Brothers Corporation and St. Paul Fire & Marine Insurance Company, in their capacity as defendants to the Jones Act and general maritime law claims of Ernest Sharp in the lower court, were unaware of these proceedings and settlement.

The "formal award" or formal order of approval and findings of facts was signed by Administrative Law Judge Richard Mills. Contrary to Appendix 34 of Petitioner's Appendix, the Compensation Order was filed in the Office of Deputy Commissioner, 7th Compensation District on October 5, 1989, shortly after execution by Administrative Law Judge Richard Mills. Appendix 34 of Petitioner's Appendix states "February 9, 1993." This date is incorrect.

SUMMARY OF THE ARGUMENT

The Fifth Circuit's finding that petitioner, Ernest Sharp, obtained a "formal award" and "elected his remedy" is neither contrary nor inconsistent with prior holdings of the United States Supreme Court and lower courts. A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit is unnecessary in the absence of a conflict between existing law and the holding at issue.

Thus, there is an absence of conflict between existing law. Further suggesting that the Fifth Circuit opinion is correct, and that there is no conflict to be reviewed, respondent now prays that petitioner's Applicatioin for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

REASONS WHY WRIT SHOULD BE DENIED

ERNEST SHARP'S FORMAL AWARD AND SETTLEMENT PURSUANT TO 33 U.S.C. §908(i) CONSTITUTES AN ELECTION OF REMEDIES AND PRECLUDES HIS CLAIMS AS A JONES ACT SEAMAN

A. Petitioner, Ernest Sharp, Completed his Pursuit and Elected an Exclusive Remedy

The Jones Act (46 U.S.C.A. §688) and the Longshore and Harbor Workers' Compensation Act ("LHWCA") each provide a **remedy** to an injured maritime worker. *Southwest Marine, Inc. v. Gizoni*, ____ U.S. ____, 112 S.Ct. 486 at 491, 116 L.Ed.2d 405 (1991). *Gizoni* supports and continues with the axiom that "The Jones Act and the LHWCA are mutually exclusive." 112 S.Ct. at 492.

Petitioner's argument is flawed in its discussion of "consent judgments" and the application in this case of *res judicata* principles. This matter involves an "election of remedies" preclusion, not *res judicata*. The doctrine of election of remedies and *res judicata* are **distinct**. 25 Am. Jur.2d, Election of Remedies, Section 1(b) (1941).

The doctrine of election of remedies prevails in maritime cases. The doctrine presupposes a plurality of alternative rights or remedies, and rests upon the principle that he who seeks equity must do equity. *Smith v. Lykes Brothers-Ripley S.S. Co.*, 105 F.2d 604, *cert. denied*, 60 S.Ct. 144, 308 U.S. 604, 84 L.Ed. 505. An election of remedies is a choosing between two or more different and co-existing modes of procedure and relief. 25 Am. Jur.2d, Election of Remedies, Section 1 (1966).

It is axiomatic that the Jones Act and LHWCA provide mutually exclusive remedies. When a maritime worker goes beyond the "pursuit" of one remedy and "receives" an award of one, such a worker has elected his remedy. *Gizoni* recognizes that the Jones Act and LHWCA provide remedies, and "voluntary payments under the LHWCA without a formal award" does not bar seeking relief under the Jones Act. But, as noted by the Fifth Circuit, *Gizoni* is consistent yet distinguishable because petitioner Ernest Sharp went beyond the "pursuit" of his LHWCA remedy, and obtained an LHWCA "formal award."

Simply stated, Congress did not intend that the worker be able to pick and choose his remedy based upon which has actually conferred upon him a larger award. The LHWCA was not intended to be a "stepping stone on the way to a jury award." *Fontenot v. AWI, Inc.*, 923 F.2d 1127 (5th Cir. 1991).

B. A "Formal Award" was Issued — The Pursuit is Over

It is well established that a settlement agreement of a compensation claim filed by a longshoreman under the Longshore and Harbor Workers' Compensation Act does amount legally to a "formal award" (even if it is executed by only a deputy commissioner.) *Rodriguez v. Compass Shipping Co., Ltd.*, 617 F.2d 955 (2d Cir. 1980), *aff'd*, 451 U.S. 596, 101 S.Ct. 1945, 68 L.Ed.2d 472 (1981). In *Newkirk v. Keyes Offshore, Inc.*, 782 F.2d 499 (5th Cir. 1986), the Fifth Circuit found that a "compensation order entered upon settlement of the employee's claims and against the employer is a 'formal compensation order.' "

There is no dispute that merely accepting voluntary payments under the LHWCA without a formal award does

not bar a worker from filing a Jones Act suit. But, where an Administrative Law Judge issues a compensation order ratifying the settlement agreement, a formal award is issued. The injured party should no longer be able to bring a Jones Act suit for the same injuries. There is a difference between holding that a plaintiff may pursue only one remedy and declaring that he may receive only one award.

Finally, the cases of *Vilanova v. U.S.*, 851 F.2d 1 (1st Cir. 1988) and *Fontenot* show no conflict between circuits and the U.S. Supreme Court. Both support and extend the theory of election of remedies.

It is noted in *Vilanova*:

> "As is required by the LHWCA, 33 U.S.C. §908(i), the Deputy Commissioner of Labor for the LHWCA compensation reviewed Vilanova's settlement, and, finding that Vilanova's injuries were compensable under the LHWCA, approved it."
>
> "Because it has been determined that Vilanova's injuries are covered by the LHWCA, LHWCA compensation is Vilanova's exclusive remedy against the United States."

As in *Vilanova*, *Fontenot* held that "a finding of LHWCA coverage sought and obtained by the injured worker from the department should preclude any subsequent action against his employer for the same injury." *Id.* at 1133. The LHWCA is not a simple remedial statute intended for the benefit of workers. Rather, the LHWCA is designed to strike a balance between the concerns of the longshore and harbor workers on the one hand, and the employers on the other hand. Essentially, the employer and employee gave up the right to a trial which could be slow,

expensive and uncertain, in exchange for hopefully a quicker, less expensive, more certain administrative system. Judge Wisdom noted:

> "... In enacting the LHWCA, Congress intended that it be the sole exclusive remedy for workers within its scope, not a stepping stone on the way to a jury award." *Id.* at 1133.

Each and every decision by the lower circuit courts is consistent with *Gizoni*. *Gizoni* merely states that an employee who receives **voluntary payments** under the LHWCA without a formal award is not barred from subsequently seeking relief under the Jones Act. However, once there is a formal award, the claimant has elected his remedy and is precluded from pursuing any other.

Administrative Law Judges have exclusive jurisdiction under the LHWCA regarding the approval of settlement of claims. Approval under Section 8(i) is the only way to discharge the liability of the employer and the carrier under the LHWCA. In the instant situation, Administrative Law Judge Richard Mills issued specific findings maintaining jurisdiction and entered an order approving the settlement. This was done in accordance with the express jurisdiction provisions of the LHWCA, and the Code of Federal Regulations. The settlement was formally approved and constituted an affirmative, binding election of a remedy which barred petitioner's Jones Act claim.

Petitioner, Ernest Sharp, relies on cases that involve the mere acceptance of LHWCA compensation benefits. An 8(i) application is not the equivalent of "mere acceptance for compensation benefits." Rather, an 8(i) application is the formal procedure before the Department of Labor which has exclusive jurisdiction to approve all settlements between the employer and the employee.

CONCLUSION

The Fifth Circuit's opinion is not in conflict with any current holdings of the Fifth Circuit, nor in any other circuit. Additionally, the Fifth Circuit opinion is consistent with *Gizoni*. Petitioner, Ernest Sharp, went beyond the pursuit of voluntary payments.

A maritime worker does not have to choose between pursuing his potential remedies under the LHWCA and the Jones Act. But, when he chooses a remedy by receiving an LHWCA award, he has elected an exclusive remedy. He is barred at that point from Jones Act relief.